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In the Supreme Court of the United States

OCTOBER TERM, 1991

ROSEMARY M. MEDLEY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF MILITARY APPEALS

BRIEF FOR THE UNITED STATES
- IN OPPOSITION

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QUESTION PRESENTED

Whether convicting petitioner for failing to report to military authorities the drug use of other service-members violated her Fifth Amendment privilege against compelled self-incrimination.

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OPINIONS BELOW

The opinion of the Court of Military Appeals, Pet. App. 7a-15a, is reported at 33 M.J. 75. The opinion of the Air Force Court of Military Review, Pet. App. 1a-6a, is reported at 30 M.J. 879.

JURISDICTION

The judgment of the Court of Military Appeals was entered on September 4, 1991. The petition for a writ of certiorari was filed on December 2, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1259(3).

STATEMENT

Following a general court-martial at Langley Air Force Base in Virginia, petitioner, a member of the United States Air Force, was convicted on three counts of the wrongful use of cocaine, and on two counts of dereliction of duty for failing to report marijuana and cocaine use by subordinate Air Force members, in violation of Articles 112a and 92 of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. 912a and 892. She was sentenced to four years' confinement, a bad-conduct discharge, forfeiture of \$600 of pay per month for four years, and a reduction in rank to the lowest enlisted grade. The convening authority reduced petitioner's term of imprisonment and the period of her forfeitures to two years, but otherwise affirmed the findings and sentence. The Air Force Court of Military Review set aside petitioner's conviction of dereliction of duty for failure to report marijuana use by subordinate Air Force members and reduced petitioner's period of confinement and forfeiture to 14 months, but otherwise affirmed the findings and sentence as approved by the convening authority. The Court of Military Appeals granted discretionary review and affirmed.

1. Air Force noncommissioned officers have a duty to report illegal drug use by subordinate servicemembers to appropriate military authorities. The relevant regulation states that every airman is "responsible for * * * reporting known or suspected incidents of drug abuse by others." Air Force Reg. 30-1 (May 4, 1983). Pet. 2 (parties stipulated that "Air Force Regulations impose an affirmative obligation on noncommissioned officers to disclose" knowledge of illegal drug use by other servicemembers); PX 1. The Air Force imposes this duty on noncommissioned officers

because drug use impairs servicemembers' readiness and ability to perform their military functions, see *Murray v. Haldeman*, 16 M.J. 74, 79 (C.M.A. 1983), and because noncommissioned officers "have a fundamental obligation to intervene and prevent criminal or negligent conduct." Pet. App. 11a.

2. Petitioner was an Air Force noncommissioned officer and knew her duty in this regard. PX 1; Pet. App. 14a (Everett, J., concurring). Nevertheless, over a period of approximately six months, petitioner attended numerous social gatherings at which subordinate Air Force members used cocaine and marijuana in her presence. On some, but not all, of those occasions, petitioner used cocaine. Pet. App. 8a-9a. Petitioner never reported any of those incidents to the appropriate military authorities.

Petitioner was charged with dereliction of duty for failing to report the cocaine and marijuana use of other servicemembers, in violation of Air Force regulation and Article 92(3) of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. 892(3), and the wrongful use of cocaine, in violation of UCMJ Article 112a, 10 U.S.C. 912a. Pet. App. 2a, 8a. Several charges were "paired" or pleaded in the alternative so that for each instance of misconduct, petitioner could be convicted of either dereliction of duty for failing to report the drug use of other servicemembers, or for using drugs herself, but not for both charges. See Tr. 265. The charges were so framed because controlling military case law holds that, where the officer participated in drug use along with others, the officer may be convicted of the drug use, but not of dereliction of duty for failing to report the use by others. *United States v. Heyward*, 22 M.J. 35 (C.M.A.), cert. denied, 479 U.S. 1011 (1986); *United*

States v. Thompson, 22 M.J. 40 (C.M.A. 1986). This principle has become known in military law as the *Heyward* exception.

The trial judge instructed the court-martial panel about the *Heyward* exception, explaining that petitioner "could not be convicted of failing to report her fellow servicemembers for any occasion on which she herself participated in the drug usage." Pet. App. 8a; see Tr. 265 ("I advise you the accused may not be convicted of failing to report illegal drug use by others if the accused at the same time was also using illegal drugs. * * * You may not find [petitioner] guilty of both the wrongful use of cocaine and dereliction of duty for not reporting use by others on the same occasion.").

Two of the charges, Additional Charges I and II, covered a time frame in which more than one occasion of drug use or observance occurred. Additional Charge I alleged that petitioner had used cocaine on "divers occasions," and Additional Charge II that she had failed to report the cocaine use of other servicemembers, also on "divers occasions." Tr. 265; I.O. Exh. 1. Since petitioner might have used cocaine with fellow servicemembers on one of those "divers occasions" and merely observed it on another, the court-martial panel was instructed that petitioner could be convicted for both the cocaine use alleged in Additional Charge I and the failure to report the drug use of others alleged in Additional Charge II. Tr. 265. The panel was cautioned, however, that it could convict petitioner on both charges only if the instances were distinct; in other words, she could be convicted on both charges only if she were guilty of drug "use on one of these occasions, and guilty of dereliction on the other occasion." *Ibid.*

Petitioner was convicted of three instances of cocaine use and two instances of dereliction of duty. With respect to Additional Charge I, the panel found that she had used cocaine as specified, but not "on divers occasions." Tr. 282. By that, the panel meant that petitioner was found guilty of using cocaine only once during the period covered by that charge. See Tr. 265. The court-martial panel also found that petitioner had failed to report cocaine use by other Air Force members on other "divers occasions," as alleged in Additional Charge II. Tr. 282. See also AX 19 (verdict worksheet).

3. The Air Force Court of Military Review affirmed petitioner's convictions for cocaine use and one of her convictions for dereliction of duty. Pet. App. 1a-6a. The court, however, vacated her other conviction for dereliction of duty, relying on the *Heyward* rule that a servicemember may not be convicted of failing to report an incident of drug use by others if he or she was also using drugs on that occasion. Pet. App. 4a. At the same time, the court rejected her challenge to her conviction for dereliction of duty under Additional Charge II, the subject of the certiorari petition. Petitioner, the court recognized, had engaged in illegal drug use with the same individuals whom she was required to report. *Id.* at 3a. Nonetheless, since the incident of cocaine use for which she was convicted under Additional Charge I was distinct from the incident of failure to report the drug use of others charged in Additional Charge II, Pet. App. 4a-5a, the *Heyward* exception did not apply to Additional Charges I and II. That exception excuses only the failure to report the drug use of others on occasions on which the servicemember actually participates in the drug use; it does not excuse

failure to report all individuals with whom the servicemember has used drugs on other occasions. *Id.* at 3a-4a. The court reduced petitioner's confinement and forfeiture to 14 months, but it affirmed petitioner's discharge and reduction in rank. *Id.* at 5a.

4. The Court of Military Appeals granted discretionary review and affirmed. Pet. App. 7a-15a. Petitioner argued there, as she does here, that requiring her to report drug use by individuals with whom she had used drugs on other occasions violated her Fifth Amendment privilege against compulsory self-incrimination. Petitioner's contention, the court noted, "is that the ongoing drug activities of her social circle were so interrelated that it would have been impossible for her to report one incident without potentially incriminating herself with respect to the other incidents." Pet. App. 10a. The court thus turned to the framework adopted by the plurality in *California v. Byers*, 402 U.S. 424 (1971), and balanced the strength "of the policies in favor of a disclosure" against petitioner's interest in avoiding self-incrimination. Pet. App. 11a.

Military leaders, the court explained, have a "fundamental obligation to intervene and prevent criminal and negligent conduct." Pet. App. 11a. Ignoring the "blatant criminal conduct of subordinates," the court reasoned, is inconsistent with that obligation: "This classic duty not to tolerate malfeasance cuts to the very core of military leadership and responsibility." Pet. App. 12a. Because the policy behind the reporting requirement was "more than powerful," indeed, "axiomatic," the court had "no hesitation" in upholding petitioner's duty to report "her subordinates' criminal conduct, notwithstanding the fact that she was found to have joined them in crime on other occasions." *Ibid.*

ARGUMENT

Petitioner does not challenge her convictions for using cocaine; she concedes, as she must, that the Air Force may punish her for her illegal use of controlled substances. Instead, she claims only that her conviction for dereliction of duty runs afoul of the Fifth Amendment.¹

1. Air Force regulations do not require servicemembers to report their own illegal drug use; they require only that servicemembers report incidents of drug use by other servicemembers. Air Force Reg. 30-1 (May 4, 1983); Pet. 2; PX 1; *United States v. Heyward*, 22 M.J. at 37. Since the Fifth Amendment prohibits only compelled *self*-incrimination—not the compelled incrimination of others—the regulations are entirely constitutional.

¹ It is possible that petitioner's sentence would be unaffected by reversal of her conviction for dereliction of duty. For example, in *United States v. Heyward*, 22 M.J. 689 (A.F.C.M.R. 1986), just that happened. Even though the Court of Military Appeals set aside certain findings of guilt on a charge of failing to report the marijuana use of other servicemembers, on remand the court of military review found the original sentence appropriate based on the charges which were affirmed. There is good reason to believe that would occur here too. The maximum punishment for petitioner's cocaine convictions is a dishonorable discharge, 15 years' confinement, total forfeiture of pay for 15 years, and reduction to the lowest rank. The maximum punishment for the contested dereliction of duty offense, on the other hand, is only a bad conduct discharge, six months' confinement, forfeiture of pay for six months, and reduction to the lowest rank. *Manual for Courts-Martial, United States*, App. 12, Maximum Punishment Chart (1984). Because of this disparity, reversal of the lesser charge of dereliction of duty is unlikely to materially affect petitioner's sentence.

Petitioner argues that disclosure of her subordinates' drug use could have "touch[ed] off a chain reaction," Pet. App. 11a, that might ultimately have led to information that would incriminate her. She argues that if she had reported the drug use of her subordinates, her report would have focused the attention of military authorities on her subordinates who had seen her use drugs on other occasions and who might have revealed her activities to the authorities.

While the scenario petitioner constructs is not wholly fanciful, the possibility that such a hypothetical sequence of events could take place does not render the Air Force's reporting requirements unconstitutional. On the contrary, "[i]n order to invoke the privilege it is necessary to show that the compelled disclosures will *themselves* confront the claimant with 'substantial hazards of self-incrimination.'" *Byers*, 402 U.S. at 429 (plurality opinion) (emphasis added). That is not true here. The required disclosures would not themselves have incriminated petitioner, as there is nothing illegal about "know[ing] or suspect[ing]" the drug use of others.

In light of the *Heyward* rule, servicemembers are not required to report incidents of drug use by others if they also participated in the drug use. As a result of that rule, any disclosure compelled by the regulation is one that, by definition, does not implicate the reporting servicemember; any incident of drug use in which she did participate is exempt from disclosure. Accordingly, the requirement is consistent with the Fifth Amendment privilege, as it is "facially neutral" and neither requires nor implies any "admission of criminal activity by the declarant." *Heyward*, 22 M.J. at 37.

2. In any event, the possibility that the “[i]nformation revealed” might “be ‘a link in the chain’ of evidence leading to prosecution and conviction,” will not alone invalidate a reporting requirement. *Byers*, 402 U.S. at 427-428 (plurality opinion). Instead, the courts must balance the “public need [for disclosure] on the one hand, and the individual claim to constitutional protections on the other.” *Id.* at 427. The Court of Military Appeals did precisely that here, correctly concluding that the balance tips decisively in favor of the reporting requirement.

a. The strength of the policy behind the Air Force’s reporting requirement is best determined by looking at the function of the Armed Services in our society, the impact drug abuse could have on that function, and the need for members of the military to assume special duties. As this Court has recognized:

To prepare for and perform its vital role, the military must insist upon a respect for duty and a discipline without counterpart in civilian life. The laws and traditions governing that discipline have a long history; but they are founded on unique military exigencies as powerful now as in the past.

Schlesinger v. Councilman, 420 U.S. 738, 757 (1975). The military’s “primary business” is, of course, “to fight or be ready to fight wars should the occasion arise.” *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 17 (1955). It goes without saying that illicit drug use interferes with that business. Drug abuse impairs the ability of drug-using servicemembers to fulfill their military mission. It also places all servicemembers, drug-abusing or drug-free, in danger, since a weapon or other dangerous instrumentality in the hands of a drug-impaired servicemember imperils not just the drug-abuser but anyone

with the misfortune of being nearby. For that reason, drug abuse in the military has long been regarded as presenting "a special threat to the performance of the mission entrusted by the Constitution and Congress to the Armed Services." *Murray*, 16 M.J. at 79. To combat that threat and to "maintain high standards of health, morale, and fitness for duty," the Air Force is justified in imposing "upon its members a special duty to report drug abuse." *Heyward*, 22 M.J. at 36.

This justification is even stronger where, as here, the duty in question is imposed on a person in a leadership position. Military leaders are expected to maintain the discipline, morale and fitness of their subordinates.² The military's interest in requiring military leaders to report drug use by subordinates is far weightier than the interest in *Byers* in obtaining names and addresses of drivers who are involved in automobile accidents to ensure financial accountability.

b. Petitioner's interest in avoiding self-incrimination cannot outweigh the military's need for disclosure. Indeed, the risk of incrimination presented by the Air Force's reporting requirement is far less compelling than risks created by disclosure requirements this Court has upheld in the past. *United States v. Sullivan*, 274 U.S. 259 (1927) (disclosure of illegally derived income); *Byers*, 402 U.S. at 424

² As the Court of Military Appeals explained, Pet. App. 12a:

We have never intimated that it is lawful or excusable for a person in a position of military leadership to consciously ignore the blatant criminal conduct of subordinates. This classic duty not to tolerate malfeasance cuts to the very core of military leadership and responsibility. It is a duty with respect to others that clearly exceeds the duty of ordinary citizens.

(disclosure of name and address of person involved in accident). In *Sullivan*, for example, the defendant was prosecuted for failing to file a tax return. He claimed that requiring him to file a return violated the Fifth Amendment because it would reveal or suggest that he had an unlawful source of income, proceeds from sales of bootleg liquor. This Court flatly rejected his claim as pressing "the protection of the Fifth Amendment * * * too far." *Sullivan*, 274 U.S. at 263.

The income reporting requirement in *Sullivan* did create some direct risk of self-incrimination: by filing the required return, the taxpayer would have drawn attention to himself and provided evidence (albeit circumstantial) of his own wrongdoing in the form of the disclosure that he had income with no reported source. By contrast, petitioner's compliance with the reporting requirement would have focused attention not on her conduct, but on that of other servicemembers. The disclosure itself would not have revealed any wrongdoing on her part, as awareness of the drug use of others is not a crime. Thus, petitioner's claim is even more attenuated than the claim this Court rejected as "an extreme if not an extravagant application of the Fifth Amendment" in *Sullivan*. 274 U.S. at 263-264.

3. Petitioner invokes this Court's holdings in *Albertson v. Subversive Activities Control Board*, 382 U.S. 70 (1965); *Marchetti v. United States*, 390 U.S. 39 (1968), and *Grosso v. United States*, 390 U.S. 62 (1968). Pet. 4-5. Those cases, however, differ from this one in three critical respects.

First, in each of those cases, the challenged law required the individual to report his own illegal activities, which created a real, appreciable, and direct

risk of self-incrimination.³ By contrast, the regulation here did not require petitioner to report or admit her own misconduct; it required her to report the illegal acts of others, and even then only in instances in which she did not participate in that illegal conduct.

Second, “[i]n all of th[o]se cases the disclosures condemned were * * * extracted from a ‘highly selective group inherently suspect of criminal activities.’” *Byers*, 402 U.S. at 430 (plurality opinion) (quoting *Albertson*, 382 U.S. at 79); see *Marchetti*, 390 U.S. at 47 (those engaged in wagering are a group “inherently suspect of criminal activities.”); *Grosso*, 390 U.S. at 64 (petitioner “inherently suspect of criminal activities.”). By contrast, in this case there is nothing suspect about the group from which the disclosure is required; rather, the duty is incumbent upon all servicemembers. *Heyward*, 22 M.J. at 37.⁴ Compare *Byers*, 402 U.S. at 430-431 (plurality opinion) (group of all automobile drivers neither “highly selective” nor “inherently suspect of criminal activities.”).⁵

³ In *Albertson*, the individuals were required to admit membership in the Communist Party, which was, at that time, prohibited under two federal statutes. 382 U.S. at 77. In *Marchetti* and *Grosso*, bookmakers were required to pay a wagering excise tax, even though gambling was illegal under both federal law and the law of most States. 390 U.S. at 44.

⁴ One judge of the Court of Military Appeals has questioned the applicability of the reporting requirement to the lowest ranking members of the Air Force, based on lack of notice. Pet. App. 13a-14a. But notice is not an issue here. Petitioner was not a low-ranking airman but a noncommissioned officer and part of the leadership corps; she was well aware of her duty. Pet. App. 13a-15a.

⁵ It may be argued that, even though the duty runs against all servicemembers, it operates only against those who have

Third, *Marchetti*, *Albertson*, and *Grosso* did not arise in a military context. Historically, the common law has been reluctant to impose affirmative duties on citizens, whether it be to report crimes or otherwise. See Note, *Forcing the Bystander to Get Involved: A Case for a Statute Requiring Witnesses to Report Crime*, 94 Yale L. J. 1787 (1985). But the tradition in the military is different. Military leaders, in particular, have long been expected to assume special responsibilities with respect to others that “clearly exceed[] the duty of ordinary citizens.” Pet. App. 12a. See Pet. App. 14a (Everett, J., concurring). The duty not to tolerate criminal conduct that undermines military readiness and discipline is one such responsibility. Pet. App. 12a. Petitioner knew of her responsibilities in this respect, but she failed to fulfill her duty nonetheless. Nothing in the Fifth Amendment prohibits the Air Force from prosecuting her for that dereliction of duty.

4. Finally, petitioner suggests that she was convicted of failing to report the drug use of others on an occasion when she, too, was using drugs. Pet. 9. That claim is both fact-bound and meritless. As explained above, petitioner was convicted of dereliction of duty under Additional Charge II for an incident

something to report, *i.e.*, those who know or suspect the drug use of others. But there is nothing inherently illegal or suspect about having knowledge or suspicion of drug abuse by others, either. See *Byers*, 402 U.S. at 431 (plurality opinion) (even though only drivers involved in accidents are required to leave their names and addresses, the disclosure statute did not violate the Fifth Amendment because it is not a criminal offense to be involved in an accident). Furthermore, military case law exempts from disclosure those incidents that might be suspect—incidents in which the servicemember participated in the drug use. *Heyward*, 22 M.J. at 37.

of drug use distinct from those underlying her conviction for cocaine use under Additional Charge I. Pages 4-5, *supra*. As the Court of Military Appeals stated, Pet. App. 11a n.4:

The record of trial, however, reveals that each of the specifications of which [petitioner] was convicted represented a different drug event, each at a different location. The defense was fully aware of which specification referenced which event, and there was no defense request for clarification. The court members were clearly apprised of both the nature of the allegations and the fact that [petitioner] could not be convicted of failing to report drug offenses if she were a principal to that use.

The Air Force Court of Military Review was of the same view: “[Petitioner] was convicted of failing to report only as to those occasions on which she herself did not use drugs.” Pet. App. 3a (emphasis omitted).⁶ Accordingly, further review in this Court is unwarranted.⁷

⁶ This finding must be respected unless no reasonable trier of fact could conclude otherwise, since the courts of military review have independent fact-finding authority under Article 66(c) of the UCMJ, 10 U.S.C. 866(c).

⁷ Petitioner also appears to argue that convicting her of dereliction of duty under Additional Charge II after acquitting her of cocaine use for the same incident (but not others) under Additional Charge I is “manifestly unfair.” Pet. 8-9. We fail to see the unfairness. Petitioner cites no precedent or rule of procedure that suggests an indictment may not be structured so that acquittal on one charge clears the way to conviction on another. For example, where a defendant is charged with manslaughter and murder arising from the same homicide, the jury is often instructed that it may convict him of manslaughter only if it acquits him of the murder charge. Similarly here, the court-martial panel found defendant guilty

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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of dereliction of duty as to a certain incident only after finding petitioner not guilty of using cocaine in that same incident.